Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

question, however, it is not impossible that the decision would be made on the basis of the obloquy rather than the jeopardy brought upon the plaintiff.[21] Although such a decision would represent a natural tendency to approximate the law of slander to the more liberal rules in libel,[22] it would amount to no more than a patch on an artificial, illogical structure in the law for which the only real remedy is legislation.

ÆSTHETICS AND THE FOURTEENTH AMENDMENT. — The increasing complexity of modern conditions of life has induced a growing tendency, in the interest of public welfare, to restrict the use of private property. It is but natural that this has resulted in attempts to regulate the unsightly use of property — legislation inspired solely by æsthetic motives. The more usual forms are limitations on the erection of buildings, or, even more common, a prohibition of that most typical feature of American scenery, the billboard. There can be little doubt that such regulation, if reasonably exercised, is highly expedient. But such legislation has met with great difficulty from the Fourteenth Amendment. One might suppose that it would clearly fall within the scope of the police power as it is so frequently broadly laid down.[1] Nevertheless, the decisions are practically unanimous in holding a regulation of the use of private property for æsthetic reasons alone beyond the police power.[2] It is, there-

[21] See Klumph *v.* Dunn, 66 Pa. St. 141.

[22] The desirability of a broader rule in slander was expressed by Mr. Justice Holmes in Rutherford *v.* Paddock, 180 Mass. 289, 292, 62 N. E. 381, 382. The opposite tendency is well illustrated by Jones *v.* Jones, [1916] 1 K. B. 350, 358: "The law of slander is an artificial law, resting on very artificial distinctions and refinements, and all the court can do is to apply the law to those cases in which hereto it has been held applicable."

[1] "It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." Justice Holmes in Noble *v.* Haskell, 219 U. S. 104, 111. "It may be said to be the right of the State to prescribe regulations for the good order, peace, health, protection, comfort, convenience and morals of the community." Champer *v.* City of Greencastle, 138 Ind. 339, 351, 35 N. E. 14, 18. "It has for its object the improvement of social and economic conditions affecting the community at large and collectively with a view to bring about 'the greatest good of the greatest number.' Courts have consistently and wisely declined to set any fixed limitations upon subjects calling for the exercise of this power. It is elastic and is exercised from time to time as varying social conditions demand correction." People *v.* Brazee, 149 N. W. 1053, 1054 (Mich.). Coupled with such judicial utterances the admission of Justice Brown in Holden *v.* Hardy, 169 U. S. 366, 385, that "This court has not failed to recognize that the law is, to a certain extent, a progressive science," offers hope for a more liberal treatment of this question in the future.

[2] In the following cases billboard ordinances were declared unconstitutional: Varney & Green *v.* Williams, 155 Cal. 318, 100 Pac. 867; Curran Bill Posting Co. *v.* Denver, 47 Colo. 221, 107 Pac. 261; Haller Sign Works *v.* The Physical Culture Training School, 249 Ill. 436, 94 N. E. 920; Haskell *v.* Howard, 109 N. E. 992 (Ill.); Crawford *v.* City of Topeka, 61 Kan. 756; Kansas City Gunning Advertising Co. *v.* Kansas City, 240 Mo. 679, 144 S. W. 1099; Passaic *v.* Paterson Bill Posting Co., 72 N. J. L. 285, 62 Atl. 267; People *v.* Green, 85 App. Div. (N. Y.) 400; People *v.* Murphy, 195 N. Y. 126, 88 N. E. 17; State *v.* Whitlock, 149 N. C. 542, 63 S. E. 123; State *v.* Staples, 157 N. C. 637, 73 S. E. 112; Bryan *v.* City of Chester, 212 Pa. 259, 61 Atl. 894.

In the following cases æsthetic building regulations were held invalid: People *v.*

fore, of great interest to note a decision in the Philippines, *Churchill* v. *Rafferty*, 14 Phil. Gaz. 383 (Phil. Sup. Ct.),[3] which holds that an ordinance allowing the removal of billboards "offensive to the sight" was not a taking of property without due process.[4]

It is clear that to some extent at least the law recognizes æsthetics as a matter of public interest. A state unquestionably has power, which it may delegate to a municipal corporation, to expend public moneys for purely æsthetic purposes, such as the erection of statues, or in preserving natural scenery.[5] Further, although there is no unanimity among the authorities, some cases have allowed property to be condemned under the right of eminent domain to be used solely for æsthetic purposes.[6] Thus, it has been held constitutional to condemn land for a road to give access to natural scenery.[7] A noteworthy case has allowed property adjoining a park to be condemned for the purpose of adding to the beauty of the park.[8] It is to be noticed that the user of streets is also subject to any reasonable regulation as state property, presumably even for æsthetic reasons.[9] The ordinary type of ordinance imposing æsthetic regulation has usually certain similarities to these cases. It is

---

City of Chicago, 261 Ill. 16, 103 N. E. 609; Quintini *v.* City of Bay St. Louis, 64 Miss. 483, 1 So. 625; Willison *v.* Cooke, 54 Colo. 320, 130 Pac. 828. See also 27 HARV. L. REV. 571.

But observe the *dicta* in the following cases which, though possibly unconsciously, seem to point to a more liberal view. *In re* Wilshire, 103 Fed. 620, 623; *Ex parte* Quong Wo, 161 Cal. 220, 232, 118 Pac. 714, 719; People *v.* Ericsson, 263 Ill. 368, 374, 105 N. E. 315, 318; Cochran *v.* Preston, 108 Md. 220, 229, 70 Atl. 113, 114.

[3] Compare with this case another recent case in which an ordinance forbidding the erection of unsightly building extensions was held unconstitutional. Lavery *v.* Board of Commissioners of Jersey City, 96 Atl. 203 (N. J.)

For a statement of the facts of these cases, see RECENT CASES, p. 884.

[4] Strictly speaking, this case does not involve the constitutional question presented in similar state legislation. The exact words of the Fourteenth Amendment are, however, reproduced in the Philippines organic act. 32 U. S. STAT. AT L. 693.

[5] Kingman *v.* Brockton, 153 Mass. 255, 26 N. E. 998; Hubbard *v.* Taunton, 140 Mass. 467, 5 N. E. 157; *cf.* U. S. *v.* Gettysburg Electric Ry. Co., 160 U. S. 668; Higginson *v.* Nahant, 11 Allen (Mass.) 530.

[6] U. S. *v.* Gettysburg Electric Ry. Co, *supra;* Petition of the Mount Washington Road Co., 35 N. H. 134; Parker *v.* Commonwealth, 178 Mass. 199, 59 N. E. 634, aff'd as Williams *v.* Parker, 188 U. S. 491. *Contra*, Albright *v.* Sussex County Lake & Park Commission, 71 N. J. L. 303, 57 Atl. 398. See Farist Steel Co. *v.* City of Bridgeport, 60 Conn. 278, 22 Atl. 561.

The power to condemn for a park is unquestioned; but it is usually equally supportable as a measure for public health. Shoemaker *v.* U. S., 147 U. S. 282; Wilson *v.* Lambert, 168 U. S. 611.

The suggestion has been made that the police power and the power of eminent domain are essentially the same. See "The Police Power and the Right to Compensation," E. V. Abbott, 3 HARV. L. REV. 189.

[7] Higginson *v.* Nahant, *supra*, 11 Allen (Mass.) 530.

[8] Attorney General *v.* Williams, 174 Mass. 476, 55 N. E. 77. In another case the limitation of the height of buildings in Boston was held constitutional; although justified as a public safety measure, its main objects were admittedly æsthetic. Welch *v.* Swasey 193 Mass. 364, 79 N. E. 745, aff'd 214 U. S. 91.

[9] The cases are justifiable on grounds of safety or morality, but it is submitted that the reasoning would apply equally to a purely æsthetic regulation. For general instances of such regulation, see Fifth Ave. Coach Co. *v.* City of New York, 194 N. Y. 19, 86 N. E. 824, aff'd 221 U. S. 467; Davis *v.* Massachusetts, 167 U. S. 43; State *v.* Wightman, 78 Conn. 86, 61 Atl. 56; Commonwealth *v.* McCafferty, 145 Mass. 384, 14 N. E. 451.

not a great step for the courts to regard the streets as partaking of some of the characteristics of a park, as in fact they do, and not as mere passageways, and the possibility of a regulation without compensation of land adjoining parks has been suggested.[10] In the case of a billboard statute there is in a sense a regulation of the use of a public way, since the value of the private use arises entirely from the adjoining public way. It would not involve a great advance to allow regulation of private property adjoining public places for æsthetic reasons.[11]

But another group of cases offers a line of approach toward supporting æsthetic regulation, a group with which such legislation is perhaps most naturally affiliated. Some senses are unquestionably protected by our law, that is, injuries to them are regarded as nuisances and so subject to legislative regulation or prohibition. It is clear that noisome smells are treated as nuisances, whether or not they are injurious to health.[12] Excessive noise is treated in the same way.[13] Smoke, fumes, and gases are likewise subject to regulation.[14] A user which causes vibration on a neighbor's property is a nuisance, which the law will prevent.[15] It is somewhat difficult to see why there should be this invidious distinction against the sense of sight. Possibly injuries to the other senses are so often bound up with matters of health that the courts have more easily drifted into protecting them. It is true that noise and stench are more objectionable to the average person and harder to avoid than unsightliness. On the other hand they are usually the accompaniments of a useful industry; the unsightliness but too frequently involves an uneconomic expenditure and derives its value from its offensive intrusion.

It is submitted that it is not necessary to regard all legislation which might have an æsthetic motive as valid. It is not necessary to treat public æsthetics in the same sweeping way in which public health, morals, and safety are treated. As soon as any particular form of unsightliness becomes by "strong and preponderant opinion," to quote Justice Holmes, a fit subject for regulation, the courts should recognize it as a fit subject for the exercise of the police power. As to certain forms of æsthetic regulation, that seems to be already the case; but unquestionably it is not yet so as to all. At the present time it is apparent that many courts are striving to support æsthetic legislation, wherever any possible benefit, however slight, to the public health may be pressed into service.[16] It is well settled that æsthetic motives may be auxiliary in

[10] See Attorney General *v.* Williams (*supra*), 174 Mass. 476, 478, 55 N. E. 77.

[11] It is submitted, however, that such regulation within reasonable limits may well become valid with developing public opinion.

[12] Fischer *v.* St. Louis, 194 U. S. 361; U. S. *v.* Luce, 141 Fed. 385; Bohan *v.* Port Jervis Gas Light Co., 122 N. Y. 18, 25 N. E. 246; State *v.* Woodbury, 67 Vt. 602, 32 Atl. 495.

[13] Baltimore & Potomac R. Co. *v.* Fifth Baptist Church, 108 U. S. 317; Tuebner *v.* California-Street R. Co., 66 Cal. 171, 4 Pac. 1162; Bishop *v.* Banks, 33 Conn. 118.

[14] People *v.* N. Y. Edison Co., 159 App. Div. (N. Y.) 786, 144 N. Y. Supp. 707; State *v.* Tower, 185 Mo. 79, 84 S. W. 10; Ross *v.* Butler, 19 N. J. Eq. 294.

[15] Seligman *v.* Victor Talking Machine Co., 71 N. J. Eq. 697, 63 Atl. 1093; Rogers *v.* Philadelphia Traction Co., 182 Pa. 473, 38 Atl. 399.

[16] See Reinman *v.* Little Rock, 237 U. S. 171; Hadacheck *v.* Sebastian, 36 Sup. Ct. Rep. 143; *Ex parte* Quong Wo, *supra;* People *v.* Ericsson, *supra;* Thomas Cusack Co. *v.* City of Chicago, 267 Ill. 344, 108 N. E. 340; Cochran *v.* Preston, *supra;* Welch *v.*

inducing legislation without invalidating it.[17] The resort to indirection may well foreshadow the future path of the law; it would seem but a matter of time before other courts will recognize the wisdom and soundness of the decision in the principal case.

SUPPLEMENTING MEMORY WITH BUSINESS RECORDS. — To prove the contents of the ledger of a large mercantile or industrial establishment, is the testimony of the bookkeeper sufficient, or is it necessary to produce as witnesses the host of clerks, salesmen, or other employees who alone have first-hand knowledge of the facts therein recorded? A recent Kentucky decision, following Wigmore,[1] held that the testimony of the bookkeeper was sufficient, where the slips from which the books were compiled had been destroyed by fire and and the identity of those who had actually made the sales thereby lost. *Givens* v. *Pierson*, 167 Ky. 574, 181 S. W. 324. An analogous situation arises in the case of a large establishment which has lost track of former employees, or where the expense involved in the production of all who contributed to the record is too great to be practicable. A business man regards the entries in a day-book or ledger as trustworthy. What is to be the attitude of the courts?

Where a record is made by one having personal knowledge of the transaction, as is the case in a small business, and the recorder is put on the stand, legal proof of the transaction is easily secured. If the witness can testify to a present recollection of the events, with or without the aid of the record to refresh his memory, there is no need of the record as evidence.[2] But if, as frequently happens, he cannot testify from memory, the record may be admitted in evidence upon proper authentication by him.[3] The witness identifies the record. He may recall the circumstances under which he made that particular entry, or he may only be able to testify to the conditions under which he made all his entries. The record is in his handwriting; he made an entry only immediately after effecting a transaction, at which time he would carefully record it; therefore if the books record a sale, a delivery, or what not, he must have transacted it. Thus the witness testifies that he does not remember the transaction, but that he recorded it in the book at a time when he did remember. The book evidences what he recorded. Neither his statement nor the entry is of itself evidence of the transaction to be proved; taken together they testify to the event. The hearsay rule is not violated,

---

Swasey, *supra;* City of Rochester *v.* West, 164 N. Y. 510, 58 N. E. 673; Buffalo Branch Mutual Film Corporation, *v.* Breitunger, 95 Atl. 433; Fifth Ave. Coach Co. *v.* City of N. Y., *supra; In re* Wilshire, *supra.*

[17] Welch *v.* Swasey, 193 Mass. 364, 375, 79 N. E. 745, 746.

[1] WIGMORE, EVIDENCE, § 1530.

[2] Commonwealth *v.* Ford, 130 Mass. 64; Friendly *v.* Lee, 20 Ore. 202, 25 Pac. 396.

[3] Owens *v.* Maryland, 67 Md. 307; Haven *v.* Wendell, 11 N. H. 112; Merrill *v.* Ithaca & Owego R. Co., 16 Wend. (N. Y.) 586; Cole *v* Jessup, 10 N. Y. 96; State *v.* Rawls, 2 N. & Mc.C (S. C.) 331; Insurance Co. *v.* Weides, 14 Wall. (U. S.) 375; Bourda *v.* Jones, 110 Wis. 52; and see WIGMORE, EVIDENCE, § 754. Some courts, however, do not allow the records in evidence. People *v.* Elyea, 14 Cal. 144; Hoffman *v.* Chicago, M. & St. P. Ry. Co., 40 Minn. 60, 41 N. W. 301; and see Bates *v.* Preble, 151 U. S. 149, 154.